

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>WILLIAM E. MAPLES, SR.</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 155,072 & 157,398
<b>PEABODY TECTANK</b>	)	
Respondent	)	
AND	)	
	)	
<b>NATIONAL UNION FIRE INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant and respondent both appeal from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on October 30, 1998. The Appeals Board heard oral argument May 26, 1999. Board Member Duncan A. Whittier has recused himself from participating in this case and Stacy Parkinson of Olathe, Kansas, has acted as Board Member Pro Tem in his place.

**APPEARANCES**

Patrick C. Smith of Pittsburg, Kansas, appeared on behalf of claimant. M. Doug Bell of Coffeyville, Kansas, appeared on behalf of respondent and its insurance carrier. David J. Bideau of Chanute, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

This appeal involves two claims tried together. Docket No. 155,072 involves a claim for upper extremity injuries beginning December 1988 and continuing through March 15, 1991. Docket No. 157,398 involves a low back injury which began February 1, 1990, and continued through March 15, 1991. The ALJ made a single award for both injuries. She

awarded a 56.5 percent work disability based on a 75 percent loss of ability to perform work in the open labor market and a 38 percent loss of ability to earn a comparable wage. Neither party asks that the two claims receive separate awards.

On appeal, respondent requests review of the same two issues in both cases: (1) did claimant meet with personal injury by accident arising out of and in the course of his employment and (2), if so, what is the nature and extent of his disability? Respondent contends claimant suffered a low back sprain on February 1, 1990, from which he has fully recovered. Respondent also contends claimant has no disability as a result of the alleged carpal tunnel syndrome. Finally, respondent contends the alleged shoulder injuries appeared long after claimant left employment for respondent and are not related to the employment for respondent.

Claimant also takes issue with the decision on the nature and extent of the disability. Claimant contends that his compensable injury resulted in permanent total disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds that the Award should be affirmed.

#### **Findings of Fact**

1. Claimant began having problems with his arms and shoulders in November or December 1988 while operating a spray paint gun for respondent. Claimant was referred to Dr. Chirund Lava for medical treatment. Dr. Lava diagnosed carpal tunnel syndrome and performed surgery on the right side in 1989. Surgery was recommended for the left side but was never done. Claimant testified the surgery on the right did not help significantly. He also testified that the carpal tunnel condition continued to get worse up to the day he was laid off from work for respondent, March 15, 1991.

2. Claimant injured his low back on February 1, 1990, while scooping up paint with a shovel. Claimant saw Dr. Lava the next day. Dr. Lava prescribed pain medication, took x-rays, which were normal, and released claimant to return to work. Claimant went to the first aid station several times to get pain pills but did not otherwise seek any treatment for the back until after he left employment for respondent. Claimant testified his back became progressively worse as he continued to work for respondent up to his last day of work, March 15, 1991.

3. Respondent laid claimant off March 15, 1991.

4. Dr. Vincent J. Gulfo examined claimant April 15, 1991, at the request of claimant's attorney, shortly after claimant was laid off by respondent. Dr. Gulfo found, based on

electrodiagnostic studies, there did not appear to be any problem with claimant's nervous system from the nerve root distally.

5. Claimant was examined by Dr. Edward J. Prostic on December 3, 1991, an appointment which was set up by claimant's counsel. Dr. Prostic diagnosed carpal tunnel syndrome, bilateral thoracic outlet syndrome, and sprain and strain of the low back. Dr. Prostic initially gave no rating for impairment to the shoulder. His report does mention a complaint of pain from the neck across the shoulder and elbow to the hand. He rated the impairment for the thoracic outlet syndrome and carpal tunnel syndrome as 10 percent of the whole body and rated the impairment for the low back condition as 5 percent of the whole body. He recommended that claimant restrict his lifting to 30 pounds frequently and 50 pounds occasionally and also recommended that claimant avoid repetitive use of the hands and forceful use of the hands.

6. On April 1, 1992, claimant underwent a pre-employment physical for Dayco Industries. Dr. Spencer, who gave the physical, found claimant could work at Dayco without any trouble. Claimant worked at Dayco for a week and a half as a curer before determining he could not do the job.

7. Claimant worked for five months for the City of Mulberry, mowing cemeteries and doing general road work. Claimant testified this work made his back worse but also testified that after he left work for the City, the symptoms returned to essentially the same level as before working for the City. Claimant left work for the City in August 1992. After leaving work for the City, claimant did not apply for other employment.

8. Dr. Prostic saw claimant again March 2, 1993, after claimant had worked briefly for Dayco and the City of Mulberry. At this time, Dr. Prostic noted the complaints were similar to the complaints at the first exam but the low back pain appeared to be worsening. He found intermittent numbness going to both legs with symptoms occurring more frequently and with less provocation. Dr. Prostic increased the impairment rating for the low back from the previous 5 percent to 10 percent in addition to the previous rating of 10 percent for the thoracic outlet and carpal tunnel condition which he left the same. Dr. Prostic did not note any complaints of shoulder problems.

Dr. Prostic saw claimant again November 22, 1994. At this time an MRI showed left paracentral disk herniation at L5-S1. Claimant gave a history of steroid injection to both shoulders for impingement syndrome. Dr. Prostic again increased the impairment rating, now rating claimant's total impairment as 30 percent of the whole body. Dr. Prostic also noted, from this examination, complaints suggestive of symptom magnification disorder. He opined that claimant was unemployable from a combination of the orthopedic and psychological problems.

Finally, Dr. Prostic saw claimant September 30, 1997. He again increased the impairment rating, this time to 40 percent of the whole body. He recommended claimant

avoid more than minimal use of either hand at or above shoulder level, avoid repeated forceful use of the right hand especially in wrist flexion, avoid lifting greater than 25 pounds occasionally and 10 pounds frequently, avoid frequent bending or twisting at the waist, avoid forceful pushing or pulling, avoid use of vibrating equipment, and recommended claimant change positions frequently.

Dr. Prostic testified that claimant's permanent injuries were from claimant's employment with respondent.

9. Dr. Theodore L. Sandow, Jr., was designated treating physician for claimant by order of the ALJ on September 17, 1993. Dr. Sandow first saw claimant November 10, 1993. Dr. Sandow saw claimant again on several occasions. Dr. Sandow did not address the carpal tunnel condition because he did not feel this was the reason claimant was seeing him. Dr. Sandow did not agree that claimant had thoracic outlet syndrome. He did diagnose shoulder impingement syndrome. Dr. Sandow opined, based on the story given him by claimant, the impingement syndrome was either caused or aggravated by claimant's work for respondent. Dr. Sandow recommended and ultimately performed surgery, an acromioplasty, for the shoulders.

Dr. Sandow also examined claimant for low back complaints. On November 16, 1993, he noted no definitive neurological findings for the low back and referred claimant for an MRI. The MRI results were questionable for bulge or herniated disk. Claimant also underwent a myelogram and CAT scan which did not show a herniated disk. Dr. Sandow felt there may be some symptom magnification. He referred claimant to Dr. Eugene E. Fibuch for pain control. Dr. Fibuch inserted a dorsal column stimulator.

Dr. Sandow, like Dr. Prostic, increased the impairment ratings. In August 1994, he rated the low back injury as 6 percent of the whole body, for each shoulder 8 percent of the upper extremity, and 6 percent to the right hand. As of August 1997, his ratings increased to 10 percent for the low back, 12 percent to each upper extremity for the shoulder impingement, and 6 percent to the right hand. His final restrictions were no lifting over 35 pounds, no repetitive bending or twisting, no above shoulder level work, no use of vibratory equipment, and avoid repetitive work with the right hand.

Dr. Sandow recommended restrictions for the low back, carpal tunnel syndrome, and shoulder impingement. For the low back, he recommended no lifting over 35 pounds and no repetitive bending or twisting. For the shoulder, he recommended no work above shoulder level. For the carpal tunnel syndrome, he recommended no vibratory equipment nor repetitive work with the right hand.

Dr. Sandow opined that the shoulder condition was work related. He was not aware of what claimant had done since leaving employment for respondent. He was not aware of Dr. Spencer's physical.

10. On September 24, 1993, claimant saw Dr. Saad M. Al-Shathir. Dr. Al-Shathir found claimant had fully recovered from his carpal tunnel syndrome, found no clinical evidence of thoracic outlet syndrome, and found low back pain with a non-anatomical distribution.

11. At the request of respondent's counsel, claimant was examined by Dr. Randall L. Hendricks. Dr. Hendricks saw claimant September 30, 1996. Dr. Hendricks could not substantiate claimant's complaints objectively and referred claimant to Dr. H. Wade Bedwell for psychological evaluation.

12. Claimant saw Dr. Bedwell, a psychologist, on November 4, 1996. Dr. Bedwell performed a clinical interview, an MMPI, and Employee Assistance Program Inventory, a Complaint Scale, and a Mental Status Exam. He agreed with Dr. Prostin's conclusion that claimant has a symptom magnification disorder. According to Dr. Bedwell, claimant is a person likely to have a hysteroid adjustment to life and may experience periods of exacerbated symptom development under stress.

13. Ms. Karen C. Terrill and Mr. Monty Longacre provided opinions about the effect claimant's injuries had on his ability to earn wages and ability to obtain employment in the open labor market. Ms. Terrill testified claimant has a 76 percent loss of access to the labor market based on Dr. Prostin's restrictions and a 75 percent loss based on Dr. Sandow's restrictions. She opined that claimant has the ability to earn \$206 per week.

Mr. Longacre did not testify but his report was introduced by stipulation. He gave separate labor market loss opinions for each injury and for each physician. According to Mr. Longacre, the labor market loss for the hand restrictions of Dr. Sandow is 42 percent and for the hand restrictions of Dr. Prostin the loss is 47 percent. The back restrictions of Dr. Sandow result in a 25 percent loss and the back restrictions by Dr. Prostin result in a 29 percent loss. The shoulder restrictions of Dr. Sandow result in a 13 percent loss of access to the open labor market and the shoulder restrictions of Dr. Prostin also result in a 13 percent loss. Dr. Hendricks recommended no restrictions and the result would be no labor market loss. Mr. Longacre also opined that claimant retains the ability to earn \$206 per week.

### **Conclusions of Law**

1. Respondent's primary complaint in this appeal relates to the fact that the Award includes disability for complaints and conditions which did not, according to respondent, manifest until long after claimant left respondent's employment. But the conclusion of the ALJ, that the shoulder impingement syndrome, low back injury, and carpal tunnel are compensable injuries, is supported by the testimony of Dr. Prostin and Dr. Sandow, as well as the claimant. The Board agrees with and affirms that finding. In our view, the most problematic injury is the shoulder injury. The ALJ specifically addressed this injury, finding that the claimant is a credible witness and gave a consistent history of pain in the shoulder since 1988. The ALJ had the opportunity to observe the claimant testify. For that reason,

and because she has made a specific finding of credibility, the Board gives some deference to the finding of credibility. From the evidence, it appears the injuries became gradually worse as a natural and direct consequence of the original injuries. The Board, therefore, agrees with and affirms the finding that the shoulder injuries, as well as the injuries to the back and to the upper extremities, are compensable injuries.

2. The Board also agrees with and adopts the finding that claimant has a 56.5 percent work disability. For the injury on March 15, 1991, the Act defined work disability as the loss of ability to perform work in the open labor market and to earn comparable wages. K.S.A. 1990 Supp. 44-510e. Ms. Terrill gives the only opinion on labor market loss based on all injuries. Mr. Longacre gives opinions for each injury but one cannot simply add those percentages as they would overlap in their effect on the ability to access the labor market. The Board therefore adopts Ms. Terrill's opinion that claimant has a 75 percent loss of ability to perform work in the open labor market. Ms. Terrill and Mr. Longacre agree that claimant has the ability to earn \$206 per week which calculates to a 38 percent loss. The Board would give equal weight to the loss of ability to perform work in the open labor market and the loss of ability to earn comparable wage. *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990). The result in this case is a 56.5 percent work disability.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on October 30, 1998, should be, and the same is hereby, affirmed.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS  
M. Doug Bell, Coffeyville, KS  
David J. Bideau, Chanute, KS  
Nelsonna Potts Barnes, Administrative Law Judge

**WILLIAM E. MAPLES, SR.**

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**DOCKET NOS. 155,072 & 157,398**

Philip S. Harness, Director